IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

IN RE	)	
	)	**NO. 3-83-00372**
SOUTHERN INDUSTRIAL BANKING CORPORATION	)	
	)	**Chapter 11**
Debtor	)	

M E M O R A N D U M

This case is before the court upon motions by the Liquidating Trustee ("Trustee") and the Committee of Holders of Contingent Interest Certificates ("Committee") to vacate two orders previously entered in this case denominated Order No. 366 and Order No. 367. The motions are opposed by ETB Corp. ("ETB"). Presently for decision are motions for summary judgment filed by the parties addressing whether the court should vacate the two orders.

I.

The following facts are not in dispute. In 1984, James Kelley, then a member of the law firm Dearborn & Ewing, represented East Tennessee Banking Corporation, the predecessor to ETB, when approved as counsel for the Trustee in 1984. Prior to being approved by the court, Dearborn & Ewing submitted an application for employment disclosing this relationship. In its application, Dearborn & Ewing represented to the court that it ". . . will not represent the Trustee in any matters where the amounts collected do not inure to the benefit of the successor in interest." The

court's order authorizing the employment of Dearborn & Ewing so limited their authority. Specifically, it provided for employment of the firm as "special counsel for the purpose of representing the Liquidating Trustee in collection efforts arising out of preferential transfers, fraudulent conveyances, and such other causes of action which would inure to the benefit of the Successor in Interest. . . ."

Subsequently, Kelley prosecuted actions against FDIC on behalf of the Trustee. Not only did the Trustee's actions include alleged preferential transfers and fraudulent conveyances, but it also included a RICO claim, the proceeds of which would benefit the holders of contingent interest certificates ("CIC holders").

These lawsuits were eventually settled for $7 million, a settlement approved by the court. Because the settlement did not apportion the proceeds among the various claims, the Trustee filed a motion seeking approval of an allocation whereby 93% of the settlement would be treated as preference and fraudulent conveyance recoveries and 7% would be treated as RICO claim recoveries. The Trustee's motion stated in relevant as follows:

> Mr. DuVoisin is charged under the Modified Plan of Reorganization confirmed in this case (the "Plan") with collecting assets of SIBC and distributing those assets in accordance with the Plan. The Plan provides, in essence, that the full amount of any recoveries by the Liquidating Trustee on preference and fraudulent conveyance actions less all reasonable and necessary expenses incurred by the Liquidating Trustee, shall be paid by the

> Liquidating Trustee to SIBC's successor in interest, East Tennessee Bank Corp. ("ETB"). The Plan further provides, in essence, that proceeds from other recoveries by the Liquidating Trustee shall be for the ultimate benefit of the holders of Contingent Interest Certificates and the Successor in Interest, subject to funding the Reserve Fund and less all reasonable and necessary expenses incurred by the Liquidating Trustee.
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> Mr. DuVoisin has evaluated in good faith the relative amounts of Settlement Proceeds to be credited to the preference and fraudulent conveyance actions, and to the RICO claims brought against the FDIC. He has determined that the vast majority of the Settlement Proceeds, ninety-three percent (93%), should be credited to the eight preference and/or fraudulent conveyance actions filed by Mr. DuVoisin against the FDIC in its capacity as receiver for seven failed banks. Mr. DuVoisin has further determined that no more than seven percent (7%) of the Settlement Proceeds should be credited to the RICO claims.

The Trustee filed his motion for allocation with the court and tendered an order approving the motion. The court thereafter scheduled a hearing on the motion which was held on July 5, 1990. At that hearing, attorney Craig Donaldson was present for James Kelley. Donaldson admitted he was not very familiar with the motion. The court stated it had received the motion and order from the Trustee, but was somewhat reluctant to sign the order without some sort of notice. The transcript of the hearing reflects that the court and Donaldson believed only the Bank of East Tennessee had been sent notice of the hearing by an associate in Kelley's office. The court stated that Kelley had tendered an order and

that the court would analyze the order and see what more, if anything, needed to be done.

On July 9, 1990, the court entered Order No. 366. That order approved the Trustee's proposed allocation of the settlement proceeds. The order also provided that it was unnecessary under the Bankruptcy Code and Bankruptcy Rules to provide notice of the Trustee's proposed distribution to creditors and other parties in interest.[1] The court wrote on the order that notice had been provided to the Bank of East Tennessee.

On July 18, 1990, the Trustee filed a motion to amend Order No. 366 to reflect that notice was given to ETB and not the Bank of East Tennessee. On July 19, 1990, the court entered Order No. 367 which reflected that the notice had been sent to ETB.

In support of his motion for summary judgment seeking to vacate Order No. 366 and Order No. 367, the Trustee asserts James Kelley advised him with respect to the proposed allocation approved by the court. The Trustee contends that because Kelley represented ETB at the same time he was allegedly advising the Trustee with respect to the allocation of funds between ETB and the CIC holders, Kelley's conflict of interest tainted the allocation process. The

[1] At the time Order No. 366 was entered, there were hundreds of persons who held contingent interest certificates. Unlike to- day, there was no Committee of Holders of Contingent Interest Cer- tificates in existence. Service of the Trustee's motion upon the hundreds of CIC holders would have been at considerable expense.

Trustee accordingly asks that a new allocation process be initiated. Although Order No. 366 and Order No. 367 were entered over a year before the motions to vacate were filed, the Trustee argues the orders are not final and may be set aside.

In support of its motion for summary judgment, the Committee argues the orders are void under the provisions of Rule 60(b)(4) of the Federal Rules of Civil Procedure because CIC holders did not receive notice of the Trustee's motion to allocate the settlement proceeds. Alternatively, the Committee relies upon Rule 60(b)(6) of the Federal Rules of Civil Procedure in seeking to vacate the orders.

In support of its motion for summary judgment, ETB argues the allocation orders were final orders and that the only procedural avenue available for attempting to vacate the orders lies with Rule 60(b). ETB further argues the orders are not void under Rule 60(b)(4) in that the CIC holders were not entitled to notice of the Trustee's motion to allocate settlement proceeds. Additionally, ETB argues the motions to vacate are untimely under the provisions of Rule 60(b) and that the Committee is not entitled to rely upon Rule 60(b)(6) to circumvent the timeliness requirement. Finally, ETB contends the Trustee has no standing to attempt to vacate Order No. 366 and Order No. 367.

II.

Turning first to ETB's contention that the Trustee lacks standing to seek to vacate Order No. 366 and Order No. 367, the court finds this contention to be without merit. These orders were the result of the Trustee's motion to allocate settlement proceeds. The Trustee was under a duty to allocate the proceeds fairly. A trustee with multiple beneficiaries must be impartial. When the interests of two beneficiaries are antagonistic, the trustee is under a duty to administer the trust so as to preserve a fair balance between them. AUSTIN WAKEMAN SCOTT, LAW OF TRUSTS § 232 (2d ed. 1956).

Since the entry of Order No. 366 and Order No. 367, the Trustee now questions whether his act in allocating the proceeds was fair. Because the Trustee believes he received advice on the allocation from an attorney who had a conflict of interest at the time, the Trustee asserts the allocation was tainted and should be reexamined. The Trustee states he is not advocating that the allocation be changed in favor of ETB or the Committee; he merely seeks a reexamination of the allocation in light of his attorney's conflict of interest. Inasmuch as the Trustee recommended the allocation of settlement proceeds and obtained the order approving his recommendation, the court fails to see how the Trustee now lacks standing to seek to vacate the order on the grounds that his recommendation may not have been impartial or fair. This is not, after all, an instance in which the Trustee is taking a position in favor of or against a beneficiary of the Trust with respect to an interpretation of an ambiguous provision of the Liquidation Trust

Agreement. Rather, the Trustee is seeking to correct an act for which he is responsible.

If, for instance, after the order approving the allocation had been entered, the Trustee discovered he had made a mathematical error in computing the allocation of settlement proceeds, it could hardly be argued that the Trustee would lack standing to attempt to correct his mistake by seeking to set aside the allocation order. Similarly, the Trustee has standing to attempt to set aside the allocation order on the grounds that his recommended allocation might not have been impartial or fair.

Turning next to the Trustee's contention that Order No. 366 and Order No. 367 were not final orders, the court must disagree. The Trustee's request that the court approve the proposed allocation was analogous to a motion for instructions. Once the court ruled upon the Trustee's motion, there was nothing left to determine with respect to the allocation issue. Indeed, if Order No. 366 and Order No. 367 were not final orders, then few, if any, of the orders entered in connection with the administration of this Trust over the years would be considered final and subject to appeal. If Order No. 366 and Order No. 367 are to be set aside, they must be set aside in accordance with the provisions of Rule 60(b) of the Federal Rules of Civil Procedure.

The Committee relies upon both Rule 60(b)(4) and Rule 60(b)(6) in seeking to set aside Order No. 366 and Order No. 367. ETB de-

nies the Committee is entitled to relief under either provision of Rule 60(b).

Rule 60(b) provides in relevant part as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

FED. R. CIV. PRO. 60(b).

The Committee argues that because the CIC holders did not receive notice of the Trustee's motion to allocate the settlement proceeds, the order granting the motion was void. The court disagrees.

Paragraph 4.4 of the Liquidation Trust Agreement enumerates in some detail the management powers bestowed upon the Trustee. After listing a number of acts the Trustee is authorized to do, Paragraph 4.4 concludes by stating as follows:

> In addition, the Liquidating Trustee shall have the power to engage in any additional acts, provided that such act shall be consummated only after no less than twenty (20) days notice to all Creditors Entitled to Notice. If within such 20-day period written objection

> to any such act is filed in the Bankruptcy Court, with a copy thereof sent by certified mail to the Liquidating Trustee, such act shall be consummated only upon approval by the Bankruptcy Court after a hearing with respect thereto.

The phrase, "Creditors Entitled to Notice," mentioned in Paragraph 4.4 is defined in Paragraph 1.6 of the Liquidation Trust Agreement as being "those creditors designated as such from time to time by the Bankruptcy Court." Hence, under the terms of the Liquidation Trust Agreement, the bankruptcy court was given the sole discretion to determine which, if any, creditors were entitled to notice of additional acts of the Trustee for which the Trustee sought approval. It is well settled that a trust is to be administered according to its terms. *Falls v. Carruthers,* 20 Tenn. App. 681, 687, 103 S.W.2d 605, 609 (1936); 76 AM. JUR. 2d *Trusts* § 375 (1992). The terms of the Liquidation Trust Agreement could have easily provided that the Trustee was authorized to apply to the court for instructions regarding settlement of claims and allocation of proceeds among trust beneficiaries without notice to any creditor or beneficiary. If it had, then such orders could have been entered without notice to creditors and beneficiaries. Because the Trust Agreement gives the court discretion to determine "Creditors Entitled to Notice," the court acted within its power in limiting notice and entering Order No. 366 and 367. Hence, Order No. 366 and Order No. 367 are not void.

Next, the Committee relies upon the provisions of Rule 60(b)(6) of the Federal Rules of Civil Procedure in seeking to vacate Order No. 366 and Order No. 377. ETB contends the Committee is not entitled to proceed under Rule 60(b)(6) because the circumstances presented here would fall within the "mistake" provision set forth in Rule 60(b)(1) or the "fraud" or "misconduct" provision set forth in Rule 60(b)(3).

Rule 60(b)(6) "grants federal courts broad authority to relieve a party from a final judgment `upon such terms as are just,' provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 863 (1988); *see also, Fuller v. Quire*, 916 F.2d 358, 360 (6th Cir. 1990); *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365-66 (6th Cir. 1990); *Hopper v. Euclid Manor Nursing Home,* 867 F.2d 291, 294 (6th Cir. 1989). If, however, the circumstances cited for relief from a final judgment are covered in one of Rule 60(b)'s first five clauses, Rule 60(b)(6) relief is not available. *Id.*

The first question in considering the Committee's Rule 60(b)(6) claim is whether the circumstances presented here fall within the scope of Rule 60(b)(1) or Rule 60(b)(3). If they do, the Committee would not be entitled to utilize Rule 60(b)(6) to vacate Order No. 366 and Order No. 367. Of course, the Committee cannot utilize Rule 60(b)(1) or Rule 60(b)(3) to vacate the orders because

those particular rule sections must be asserted within one year of entry of the final order or judgment.

ETB argues the alleged circumstances surrounding the entry of Order No. 366 and Order No. 367 would constitute "mistake" as that term is used in Rule 60(b)(1). The court disagrees.

In *Fuller v. Quire*, 916 F.2d 358 (6th Cir. 1990), the plaintiff's counsel failed to appear at a docket call and the plaintiff's case was dismissed by the district court. Almost two years later, plaintiff, represented by different counsel, moved to set aside the dismissal order under Rule 60(b)(6). The district court set aside the order of dismissal under Rule 60(b)(6) and the defendant appealed.

The defendant argued the basis for the plaintiff's Rule 60(b) motion was conduct encompassed in Rule 60(b)(1), namely mistake, inadvertence, surprise, and excusable neglect, and that the time for filing a Rule 60(b)(1) motion had expired. The court of appeals rejected this argument. As to the defendant's claim of mistake, the court found no mistake was made since the order of dismissal was the considered action of the district court when the plaintiff's counsel failed to appear at the docket call.

Similarly, the court's approval of the Trustee's recommended allocation was not a mistake. The entry of the order was the considered action of the court. Likewise, the Trustee's action in recommending the proposed allocation was a considered and inten-

tional act. In other words, the Trustee intended to do exactly what he did. Hence, because no mistake was made in the entry of Order No. 366 and Order No. 367, the circumstances presented in this case would not fall within the purview of Rule 60(b)(1).

Alternatively, ETB contends the conduct at issue here would fall within the terms of Rule 60(b)(3). ETB argues the alleged conflict of interest on the part of attorney James Kelley, and the alleged tainted advice he gave to the Trustee with respect to a proposed allocation, would be covered by Rule 60(b)(3) which allows relief from a final order for "fraud . . . or other misconduct of an adverse party." The problem with this argument is that Rule 60(b)(3) addresses fraud or misconduct on the part of an adverse party--not a party's representative. *See Alexander v. Robertson*, 882 F.2d 421 (9th Cir. 1989) (Rule 60(b)(3) does not apply where offending person was not a "party"); *United States v. Denham*, 817 F.2d 1307 (8th Cir. 1987) ("as a general rule, rule 60(b)(3) is not intended to cover acts by an attorney for the parties"); *McKinney v. Boyle*, 404 F.2d 632 (9th Cir. 1968), *cert. denied*, 394 U.S. 992 (1969) (Rule 60(b)(3) covers fraud, misrepresentation or other misconduct of an adverse party); *Roberts v. Ace Hardware*, 779 F.2d 52 (Table, Text in WESTLAW) unpublished disposition No. 84-3636 (6th Cir. Oct. 30, 1985) ("Rule 60(b)(3) requires fraud by an adverse party to warrant relief from judgment"). The alleged misconduct in this case is that of the Trustee's previous attorney who allegedly had a conflict of interest at the time he allegedly advised the

Trustee with respect to the allocation of settlement proceeds. This alleged misconduct would not fall within the purview of Rule 60(b)(3).

Because the circumstances presented here do not fall within subsections (b)(1) through (b)(5) of Rule 60, the Committee may seek to set aside Order No. 366 and Order No. 367 under the terms of Rule 60(b)(6).

"[A] motion made under Rule 60(b)(6) is addressed to the trial court's discretion which is `especially broad' given the underlying equitable principles involved." *Hopper v. Euclid Manor Nursing Home*, 867 F.2d 291 (6th Cir. 1989). While the rule does not particularize the factors that justify relief, it provides courts with authority "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. at 863-64; *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). Its application, however, should be limited to extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. at 864; *Ackermann v. United States*, 340 U.S. 193 (1950); *Hopper v. Euclid Manor Nursing Home*, 867 F.2d at 294.

In general, according to *Wright and Miller*, relief is given under Rule 60(b)(6) in cases in which judgment was obtained by improper conduct of the party whose favor it was rendered or the judgment resulted from the excusable default of the party against

whom it was directed under circumstances going beyond the earlier clauses of the rule. 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2864 (1973). The court then considers whether relief under Rule 60(b)(6) will further justice without af- fecting substantial rights of the parties. *Id.* Of course, each case turns upon its owns facts and circumstances.

In this case, CIC holders were not given notice or the opportunity to challenge the Trustee's proposed allocation of settlement proceeds. As was previously discussed, the court had the absolute discretion under the Trust Agreement to limit notice of the Trustee's proposed act of allocation. Nevertheless, limiting notice of the proposed allocation presupposed that the Trustee would have acted fairly and impartially in recommending the proposed allocation. The Trustee's revelation that he received advice on allocating these proceeds from an attorney who at the same time represented ETB raises a doubt about the fairness and impartiality of the allocation. The Trustee goes on to state, however, that given the tainted advice he received, he does not know whether the proposed allocation or some other allocation (either more or less favorable to ETB or the CIC holders) should be the proper allocation approved by the court.

Before deciding whether to grant extraordinary relief under Rule 60(b)(6), the court believes that discovery and an evidentiary hearing are needed to address the merits of the allocation issue. Only then will the court have all the facts and circumstances

before it upon which to decide whether to vacate the previous order of allocation and substitute a different allocation. The questions to be considered at the evidentiary hearing will be (1) to what extent did the Trustee receive advice from attorney James Kelly concerning the proposed allocation; (2) whether the proposed allocation previously approved by the court was a proper and fair allocation; and (3) if the allocation was not a proper or fair allocation, what would be a fair and proper allocation of the settlement proceeds. After considering the evidence presented on these factual issues, the court will determine whether to set aside the previous allocation order under Rule 60(b)(6). All pending motions for summary judgment will be denied.

An order will enter.

JOHN C. COOK
United States Bankruptcy Judge